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MICHAEL RODMICK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1211

BULK TERMINALS COMPANY and GERALD L. SPAETH,

Petitioners,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RICHARD BRICELAND, Director of the Environmental Protection Agency, CITIZENS FOR A BETTER ENVIRONMENT, POLLUTION CONTROL BOARD of the State of Illinois, and JACOB D. DUMELLE, DONALD A. HENSS, SIDNEY M. MARDER, RUSSELL T. ODELL, ROGER G. SEAMAN, members of the Pollution Control Board of Illinois,

Respondents.

**Objections Of Respondents Environmental Protection Agency, Pollution Control Board, Briceland, Dumelle, Henss, Marder, Odell And Seaman To
Petition For Writ Of Certiorari**

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SUPPLEMENTAL STATEMENT OF FACTS

The administrative proceeding which is the subject of this Petition for Certiorari was filed on March 24, 1974 before the Illinois Pollution Control Board¹ in the form

¹ The Pollution Control Board is an independent administrative body of the State of Illinois consisting of five "technically qualified" members. The statute does not require

of a Complaint charging Bulk Terminals with Air Pollution as defined by Section 3(b) of the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, § 1003(b) and Rule 102 of Chapter 2 of the Pollution Control Board's Air Pollution Rules and Regulations. The Complaint charged that Bulk Terminals emitted silicone tetrachloride, from certain storage tanks which it owned in a populated area on the South side of the City of Chicago. The Complaint also alleged that the chemical reacted with moisture in the air to form a mist consisting of hydrochloric acid and silicone dioxide and that the emissions, which were alleged to have continued from April 26, 1974 through May 15, 1974, resulted in physical illness, and a need to medically treat residents and evacuate businesses in order to prevent further or continued injuries. The Complaint, pursuant to the statute, requested civil monetary penalties as set forth in Section 42(a) of the Illinois Environmental Protection Act (Ill. Rev. Stat. (1975) ch. 111½ § 1042(a)) and such equitable relief as the Board determined to be necessary. See Ill. Rev. Stat. (1975) ch. 111½ § 1033(b).

Bulk Terminals filed a Motion to Dismiss Complaint before the Pollution Control Board wherein it alleged that on July 19, 1974, the municipal division of the Cir-

¹ continued

that any Board member be a lawyer but in practice at least one member and several assistants have been. The Board has power to both adopt environmental regulations and to hear complaints filed by private citizens and by the Illinois Environmental Protection Agency. It has no power to order imprisonment, but merely the power to impose certain civil fines and order equitable relief. *City of Waukegan v. Pollution Control Board*, 57 Ill.2d 170 (1974) The Board has no power to enforce its own orders and must seek such enforcement in the Circuit Courts of the State of Illinois. Ill. Rev. Stat. (1975) ch. 111½ § 1042 (c) & (d) No review of the Board's decision is allowed in the action to enforce the Board's order, the only review allowable being directly in the Appellate Court after entry of a final decision by the Board. Ill. Rev. Stat. (1975) ch. 111½ § 1041.

cuit Court of Cook County, in a "quasi-criminal" suit² brought by the City of Chicago found that Bulk Terminals had violated Section 17-2.6 of the Municipal Code of the City of Chicago for the dates April 26 through May 9, 1974 inclusive, and had imposed a civil fine of \$4,500 pursuant to that section. The Motion to Dismiss alleged that the monetary penalty imposed in the proceeding by the City was a criminal fine. It also alleged that the Board's proceeding was also criminal in nature and therefore barred by the doctrine of res judicata and double jeopardy.

This motion was denied and the Board ordered the case set for hearing. Before any hearings or substantial discovery were allowed, however, petitioners filed their action for prohibition and injunction in the Circuit Court.

OBJECTIONS TO THE JURISDICTION OF THE COURT

Petitioners here invoked this court's jurisdiction under 28 U.S.C. § 1257(3). This Court also lacks jurisdiction to review under that provision inasmuch as Congress has delegated to the Court by that provision only the power to review "final judgments". A final judgment is one

² *Bulk* was prosecuted for a fine only which, under the relevant provisions of the ordinance in question, precluded the City from seeking, in that same proceeding, to prosecute the offense as misdemeanor or to seek the punishment of incarceration in the county jail. The ordinance in question requires that, where the action is prosecuted is a misdemeanor, there must be a separate proceeding. The nature of the state's quasi-criminal practice is further described in Note, "The Quasi-Criminal Ordinance Prosecution in Illinois" 68 N. W. L. Rev. 566 (1973), *passim*.

that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment". A decision denying a motion to dismiss or ordering further proceedings by the trial court or agency is generally held not to be "final". *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 495-6 (1956). The purposes of the final judgment rule are: conservation of the court's resources, avoidance of unnecessary interference with state court proceedings, ensurance of correct decisions by allowing the development of a full record, and avoidance of unnecessary constitutional questions. See also *Republic Natural Gas Co. v. State of Oklahoma*, 342 U.S. 62, 71-72 (1948) These purposes would be satisfied in this case by denying review on the ground of a lack of final judgment.

In essence the action filed in the Circuit Court of Cook County was a proceeding to review an interlocutory decision of the Pollution Control Board denying the petitioners' motion to dismiss the administrative complaint. It thus was an action seeking review of something other than a final judgment of the Board. The Illinois Supreme Court in this case denied the petitioners' writ of prohibition to enjoin the proceedings before the Board and required petitioners to exhaust their remedies under Section 41 of the Illinois Environmental Protection Act. Substantial litigation on the merits remains before the Board and the Board's final decision may avoid the constitutional questions raised by the petitioners here or shed light on these issues.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

Petitioners' Due Process Rights Are Satisfied By A Board Hearing On Their Motion To Dismiss Because Of Double Jeopardy And By Judicial Review Of The Board's Final Decision On Grounds That It Violates Double Jeopardy.

Petitioners do not allege that the Board's procedures fail to satisfy their due process rights of notice and an opportunity to be heard. The Illinois Environmental Protection Act provides, and petitioners have received, written notice, together with a formal complaint, which specified the alleged violations. The Act provides for a hearing procedure similar to that found in a court. The Act and the Board's procedural rules provide for the right to counsel, testimony, cross-examination, transcript, and oral and written argument. The Board's regulations provide that that Board pass on motions to dismiss and the Board did so in this case.

The Illinois Supreme Court held in this case that the Board was competent to decide the double jeopardy question in the first instance (65 Ill. 2nd at 38), and petitioners have not challenged this holding. Administrative agencies are competent to initially decide constitutional issues germane to the proceedings before them, even where such issue is the constitutionality of their jurisdiction over the case before them. In *Meyers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), the petitioner alleged that the National Labor Relations Board lacked jurisdiction over him since petitioner's business operations were not conducted and his products were not sold in interstate or foreign commerce. This

Court upheld the Board's power to decide whether interstate or foreign commerce was involved and thus whether it had jurisdiction. 303 U.S. at 49-50. Since the procedure before the Board was appropriate and judicial review of the Board's decision was adequate, Congress had power to vest exclusive jurisdiction in the Board subject to review in the Circuit Court of Appeals. This Court required the petitioner to exhaust his administrative remedies despite the possibility of an erroneous initial decision of rights guaranteed by the federal constitution. Moreover this Court asserted:

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Law suits also often prove groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact. 303 U.S. at 51-52.

Petitioners here sought to circumvent Illinois' requirement of exhaustion of their administrative remedies before the Board prior to judicial review of its final decision by alleging that the mere holding of the prescribed administrative hearing would result in irreparable damage. Since the Board's procedures are appropriate and judicial review of the Board's final decision is adequate, Illinois has the power to vest jurisdiction in the Board subject to review of the Board's final decision in the Illinois Court of Appeals. The mere holding of the administrative hearing would not result in irreparable damages to the petitioners here inasmuch as under the statute the most that the petitioner may be subject to is the imposition of a monetary fine. The Pollution Control Board may not impose incarceration as one of the remedies for violation of the Illinois Environmental Protection Act.

This Court has also held that Congress may require that courts decide constitutional claims on the administrative record where the administrative record is fair and adequate for the presentation of material facts. *National Broadcasting Co. v. Federal Commerce Comm.*, 379 U.S. 190, 227 (1943). Petitioners here do not contend that the administrative record which will result from the Board's hearing will inadequately present the material facts to a reviewing court.

The purposes of the doctrine of exhaustion of administrative remedies are: (1) allow full development of the facts before the agency; (2) allows the agency an opportunity to exercise its expertise to the presented facts; and (3) give the aggrieved party an opportunity to succeed before the administrative agency and thus possibly to render judicial review unnecessary. *Illinois Bell Telephone Co. v. Allphin*, 60 Ill. 2d 350, 357-9. The Illinois Supreme Court reasonably denied the petitioners' attempt to interrupt the State Administration proceeding and held that the purposes behind its state law requirement of exhaustion of statutory remedies would be furthered by requiring petitioners to exhaust their available remedies under Illinois state law.

II.

Neither Due Process Nor Double Jeopardy Requires That Petitioners Be Accorded Judicial Review Of Their Double Jeopardy Claim Before The Allegedly Unconstitutional Second Trial Has Been Completed.

Due process clearly does not establish any right to appeal from a full and fair trial on the merits resulting in a final court judgment in civil or criminal cases.

Lindsay v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876 (1972); *Ortween v. Schwab*, 410 U.S. 656 (1973); *U. S. v. MacLollom*, U.S., 96 S. Ct. 2086, 2091 (1976).

This Court has never held that a defendant's motion to dismiss upon the grounds of double jeopardy requires a decision from the court of last resort, the United States Supreme Court, on the double jeopardy claim prior to the allegedly invalid second prosecution in order to fully vindicate defendant's right to be free from a second prosecution. Only such a construction of petitioners' double jeopardy and due process rights can sustain petitioners' contention that the double jeopardy right "would be meaningless if there is no way to invoke it prior to the second prosecution". (Petitioners' brief pg. 11, f. 2).

The petitioners' construction of the appropriate remedy for vindication of purported due process and double jeopardy rights would grant every defendant a pretrial right of review in the United States Supreme Court on his double jeopardy claim, since any lower court or administrative agency might decide the question erroneously and thus fail to protect the petitioners' right to be free from a second prosecution. In effect petitioners claim that the clause creates not only a right to be heard on their assertions by a trial court, but also that they have a constitutional right to pretrial appellate review of the correctness of the trial court's holding. In essence the petitioner seeks not only a hearing on its double jeopardy claim but a hearing free from error prior to any trial. The double jeopardy and due process clauses do not grant an individual the absolute right to be immune from a second criminal prosecution for the same offense. Rather double jeopardy provides a defendant with a defense which, if improperly overruled, may constitute the basis for the reversal of a final judgment

against him. In *Rankin v. State*, 78 U.S. 380 (1870) a Tennessee murder defendant pleaded in bar an acquittal by a general court-martial for the same crime. The Tennessee Supreme Court reversed an order sustaining the plea and remanded for trial on the merits. This court dismissed the writ on the ground that the state court judgment was not final despite the defendant's claim of double jeopardy. In *Heike v. U.S.*, 217 U.S. 423, 432-3 (1910), this Court reaffirmed *Rankin* stating:

The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held . . . to give a right of review before final judgment.

These decisions came after this Court's statement in *U.S. v. Ball*, 163 U.S. 662, 669 (1896), that "the prohibition [of the double jeopardy clause] is not against being twice punished, but against being twice put in jeopardy". *Ranke* and *Heike* thus reject the petitioners' view that the purposes of the double jeopardy and due process clauses can only be served by *preventing* illegal prosecutions, rather than by *reversing* illegal convictions.

In *Parr v. United States*, 351 U.S. 513 (1956), this Court held unappealable a dismissal of the government's indictment after a second indictment was obtained for the same offense in another district. Petitioner alleged that he had a right to be tried under the first indictment or not at all. This Court held it lacked jurisdiction of the appeal since there was no final judgment despite the dissent's contention that petitioner might be required to undergo two trials and that 28 U.S.C. Section 1291 should not be construed so as to bring about such a result. 351 U.S. at 523.

This view of the purposes of the double jeopardy and due process clauses has been followed by the Fifth Circuit. In *United States v. Bailey*, 512 F. 2d 883 (5th Cir. 1975), the defendant in a criminal proceeding filed a motion to dismiss an indictment upon the grounds of former jeopardy and after its denial sought to appeal the order, claiming that unless interlocutory review of the trial court's order were allowed he would be deprived of his constitutional right to be free from a second prosecution. The court dismissed this contention, 512 F. 2d at 835, citing an earlier case, *Gilmore v. United States*, 264 F. 2d 44 (5th Cir. 1959), cert. denied 359 U.S. 994 (1959). The court reasoned that so long as a case was pending, review of matters such as unlawful indictment, unlawful search and seizure, unlawful arrest, unlawful confession, and double jeopardy must await the trial and its outcome. "This is so even though at the end of that trial, on appeal from the judgment of conviction, it is ultimately determined that the violation of the constitutional right compels an acquittal". 512 F. 2d at 835.³

³ Other circuits have taken a contrary position on the interpretation of "final decision" in 28 U.S.C. § 1291. See: *U.S. v. Young*, 19 Crim. L. Rptr. 512 (9th Cir. 1976); *U.S. v. Beckerman*, 512 F.2d 905 (2nd Cir. 1975); *U.S. v. Aless*, 19 Crim. L. Rptr. 2375 (2nd Cir. 1976); *U.S. v. Lansdown*, 460 F.2d 164, 171 (4th Cir. 1972); *U.S. v. Disiloio*, 520 F.2d 247, 248 N. 2a, (3rd Cir. 1975); *U.S. v. Barket*, 430 F.2d 181 (8th Cir. 1975). These cases do not support the contention that due process and double jeopardy required interlocutory review in this instance because they construe the words "final decision" only so as to avoid the constitutional question, rather than holding that due process and double jeopardy require such review before trial. These efforts to avoid the constitutional question involved will no doubt contribute to the workload of the particular courts of appeal.

III.

Review By The Court At This Time Would Be Contrary To Fundamental Principles Of Federalism.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court denied an injunction of state court criminal proceedings on grounds based upon its interpretation of the need for a proper respect of state court functions, unnecessary duplication of legal proceedings, and an adequate remedy at law. "Pending state criminal proceedings should be enjoined only if the danger of irreparable loss is both great and immediate and only if the threat to the plaintiff's federally protected rights [is] . . . one that cannot be eliminated by his defense against a single criminal prosecution". The "cost, anxiety and inconvenience of having to defend" were insufficient grounds upon which to base federal interference with the state proceeding in *Younger*.

In *Justice v. Vail*, U.S., 45 U.S. L.W. 4269 (Mar. 22, 1977), this court recently extended the *Younger* doctrine to civil cases so as to ensure proper respect for state functions and vindication of the state's interest in interpreting and enforcing its own laws. The state system, this Court held, afforded the opportunity to pursue federal claims within it and federal court interference would reflect negatively upon the state's ability to enforce constitutional principles.

This Court's review of the Illinois Supreme Court's action after a final decision by the Pollution Control Board will be adequate to protect the petitioners' due process and double jeopardy rights. Interlocutory review will greatly interfere with state administrative proceedings and would set a precedent for such interference every time such constitutional questions are raised, no matter

how frivolous or lacking in merit such claims might be. The Illinois Pollution Control Board is seeking to advance substantial public rights regarding public health and should be allowed to do so without premature intervention by this court.

CONCLUSION

For the reasons stated heretofore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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